

NO. 82397-9

IN THE SUPREME COURT OF WASHINGTON

CITY OF SHORELINE, a Municipal Agency; and DEPUTY MAYOR
MAGGIE FIMIA, individually and in her official capacity,

Appellants,

v.

DOUG AND BETH O'NEILL, individuals,

Respondents

SUPPLEMENTAL BRIEF OF RESPONDENTS

Allied Law Group, LLC
Michele Earl-Hubbard
David Norman
Chris Roslaniec

2200 Sixth Avenue, Suite 770
Seattle, WA 98121
(206) 443-0200

Law Offices of Michael Brannan
Michael Brannan

555 Dayton St., Suite H
Edmonds, WA 98020
(425) 774-7500

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I. ASSIGNMENTS OF ERROR

A. The trial court erred in dismissing *sua sponte* O'Neill's suit without notice and reasonable opportunity to respond.

B. Division I erred in treating the request for a show cause hearing to be set as the show cause hearing itself and in concluding that the trial court held a show cause hearing.

C. Division I erred in interpreting O'Neill's first oral PRA request as not being a request for that email in its native electronic form and for the intact metadata embedded in the email.

D. The trial court erred in awarding fees and costs to the agency, and Division I erred in not addressing this issue on appeal.

E. The trial court and Division I erred in not finding that O'Neill's requests included requests for complete header information and metadata for the email.

F. Division I erred in concluding that perhaps only some, but not necessarily all, portions of metadata from a public record email could be a public record.

Issues Pertaining to Assignments of Error:

No. 1 Whether the *sua sponte* dismissal of a PRA lawsuit without notice or motion in response to a motion to set a show cause hearing was a violation of O'Neill's due process rights, the civil rules, and contrary to the procedures authorized by the PRA.

No. 2 Whether a request for an email necessarily encompasses a request for that email in its native form including its embedded metadata and full header information.

No. 3 Whether all metadata associated with an email that is a public record is itself a public record.

No. 4 Whether a trial court may award costs and fees to an agency and against a requestor in a PRA action.

II. STATEMENT OF THE CASE

Respondents Doug and Beth O'Neill ("O'Neill") herein adopt the statement of facts from Division I's Opinion except for the erroneous

statements that a show cause hearing was held and that metadata print outs would not reveal “blind-copy” (“bcc”) information.¹

III. LEGAL AUTHORITY AND ARGUMENT

A. The Court of Appeals Properly Decided Shoreline’s Issues

Shoreline and Fimia (collectively “Shoreline”) argue that Division I erred in finding a conflict between the PRA and the Local Government Agencies of Washington State Records Management Guidelines, promulgated by the Washington State Archives and Records Management Division and the Washington State Local Records Committee (“Retention Guidelines”). Shoreline challenges Division I’s conclusion that all copies of an email must be retained as a public record and alleges it expanded the definition of “identifiable public record.” *See* Petition for Direct Review (“Pet.”). Shoreline misconstrues Division I’s holdings, and is incorrect.

1. The conflict has been resolved in favor of the retention of metadata and does not warrant reversal

Shoreline’s argument presumes that the Retention Guidelines authorized the deletion of the email in question and that metadata is not a public record.² If metadata or a portion of the metadata of a public record

¹ The record shows these conclusions to be in error. *See O’Neill v. City of Shoreline*, 145 Wn. App. 913, 918-21, 187 P.3d 822 (2008) (“Opinion”); *see also* CP 20 at ¶5; CP 24-25 at ¶¶4-5; CP 352 (Order Denying Motion for Reconsideration).

² This argument also assumes that the original September 18, 2006, request for “that email” did not encompass the electronic version of the record and the metadata embedded in the email in its native form. This assumption is incorrect for the reasons set forth, *infra* Section III, part C.

is a public record, as was correctly held by Division I, and the Retention Guidelines allowed for the indiscriminate deletion of emails after printing, then a conflict existed and Division I properly concluded that the PRA governs.³ Additionally, any potential conflict has been resolved in favor of the retention of metadata, undercutting any need for review of this issue. WAC 434-662-040, which took effect January 1, 2009, provides:

Electronic records must be retained in electronic format and remain usable, searchable, retrievable and authentic for the length of the designated retention period. Printing and retaining a hard copy is not a substitute for the electronic version unless approved by the applicable records committee.

The State Archivist will not accept emails for electronic storage that lack the associated metadata. As of January 1, 2010, the WACs will address the requirement to retain metadata associated with emails. WAC 434-662-150 addresses the preservation of metadata associated with emails that are the subject of record requests:

Agencies may be relieved of the obligation to permanently retain archival e-mail by transmitting e-mail and all associated metadata to the digital archives pursuant to a transmittal agreement as provided for in WAC 434-662-090.

2. The Retention Schedules did not justify the deletion

In order for the deletion of the requested email to have been proper, Shoreline must demonstrate that: (1) the initial request for “that email” did

³ See RCW 42.56.030, stating in part, “In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.”

not encompass the electronic record; (2) the Retention Guidelines at the time justified the deletion of the email; and (3) the email was deleted prior to O'Neill's September 25, 2006 specific request for the email's metadata. Shoreline has failed to demonstrate this. The initial request for "that email" on September 18, 2006 was a request for, and mandated the retention of, the email in its native form. However, even if this Court determines that the initial request for the email did not encompass the electronic record, Shoreline's arguments still fail.

Shoreline argues that Fimia's deletion of the email was done in reliance on the retention schedules in effect at the time and that agencies must be able to rely on their retention schedules in managing records. *See* Pet. at 9-10. Fimia has admitted that she, in fact, did not delete the email pursuant to any authority.⁴ An inadvertent deletion can hardly be characterized as reliance on any retention schedule.

a) The metadata was not a record "With No Retention Value"

Shoreline relies on the "Frequently Asked Questions" portion of the Retention Guidelines in claiming it may delete emails after printing them. *See* Pet. at 9. This portion of the Retention Guidelines is a generic reference to the retention of emails; it does not address the propriety of deleting emails that are the subject of a pending records request. *See* RCW 42.56.100. Here, there

⁴ *See* CP 22 at ¶16 (Fimia stating that she must have "inadvertently deleted" the email).

was no basis for finding that the public records request for the email was resolved—the deletion of the email was thus without basis under the Retention Guidelines as they existed in 2006.⁵

Fimia cannot now, nor could she one month after O'Neill's requests were made, identify when she deleted the email.⁶ It was deleted, at the earliest, the same day O'Neill explicitly asked for the metadata.⁷ Specifically, Shoreline cannot show Fimia did not delete the email after O'Neill made her explicit request for the metadata on September 25, 2006. The argument that Fimia "inadvertently deleted" the email in this small window of time is not only factually implausible, but impossible for Shoreline to demonstrate.

b) Shoreline did not retain a copy of the metadata requested

Shoreline argues that it would be unduly burdened if it was required to retain "duplicate copies of e-mails" because the Retention Guidelines allowed for the deletion of duplicates. *See* Pet. at 13. Even if Shoreline

⁵ WAC 44-14-04006 provides "an agency should provide a closing letter stating the scope of the request and memorializing the outcome of the request." While the WAC also states that "a closing letter may not be necessary for smaller requests," O'Neill's requests for records were continuing, and she was never notified that Shoreline believed her request was closed. There is no basis in for Fimia to have assumed the request was closed—which is Shoreline's only justification for the unlawful deletion of the requested email. The requested email that Fimia deleted had been requested, at the most, only seven days prior, and was the subject of several subsequent PRA requests by O'Neill.

⁶ *See* CP 22 at ¶16.

⁷ CP 22 at ¶15; *see also* Opinion, 145 Wn. App. at 936 n.63 (Division I concluding that "the record is unclear on when an electronic version of the September 18 e-mail was destroyed").

should be required to retain only a single copy of the metadata, the copy retained in this case was not the record requested. Shoreline is unable to demonstrate that the metadata printout of the email blind-copied by Lisa Thwing to Janet Way contains the identical metadata as the original email to Fimia. *See* Pet. at 13-14. The Fimia email was the record requested, and printed-out metadata from a different email cannot be sufficient.

3. Requiring a search of Fimia's hard drive does not expand the definition of "identifiable public record"

While Shoreline has argued that it was not required to search Fimia's hard drive because it would be overly burdensome and would create a new duty under the PRA, it should be noted that this "burden" was of Fimia's making. Had the originally requested email been properly retained, the electronic version of the email and all metadata would have been easily recovered by Shoreline.

Even accepting Shoreline's argument that a request for an email is not a request for an electronic record, Shoreline still violated the PRA through its failure to search for the original email after the metadata was specifically requested by O'Neill. In a recently published opinion, the Ohio Supreme Court recognized that "as long as these emails (the subject of a public records request) remain on the hard-drives of the commissioners' computers, they do not lose their status as public records."

State ex rel. Toledo Blade Co. v. Seneca Cty. Bd. of Commrs., 120 Ohio St.3d 372, 379, 899 N.E.2d 961 (2008). It is undisputed that the City failed to search for the email on Fimia's hard drive after O'Neill specifically requested the metadata pertaining to the email.⁸

4. Including metadata as a public record pursuant to the PRA does not impose an additional burden on agencies

Shoreline alleges that because Division I found that a copy of the requested email from a different recipient did not provide O'Neill with access to the same metadata requested, this equates to an additional burden on agencies under the PRA. Pet. at 13. This is mistaken, as the Retention Guidelines already impose a duty on agencies to preserve metadata.

Further, Shoreline argues that the alleged "new burden" mandated by Division I will result in "cluttering" of email systems and unnecessarily burdening storage capabilities. Pet. at 13. Shoreline's argument was elaborated in the Amicus Brief of Washington State Association of Municipal Attorneys, who also voiced concerns over the potential expenditure of county resources in storing metadata. WSAMA Brief at 1. With respect, these claims are without basis. Within the past few years,

⁸ Tho Dao, the City's manager of information services, stated that the City did not search Deputy Mayor Fimia's hard drive: "The City only has software capable of copying the hard drives of personal computers ("PC"), not Macintosh computers ("MAC"). The deputy Mayor has a MAC, I estimate the cost to purchase the software capable of copying a MAC hard drive at somewhere between \$500 and \$1000." Opinion, 145 Wn. App. at 935-36 (citing CP 25).

the cost of data storage has dramatically decreased—a few hundred dollars can purchase enough digital memory to accommodate an entire academic research library.⁹

B. Dismissal of a Cause of Action Upon a Motion to Show Cause was Improper and a Violation of O’Neill’s Due Process Rights

Division I held the trial court did not abuse its discretion in dismissing O’Neill’s complaint without a hearing or trial, concluding that because O’Neill did not request oral argument in the motion to set a show cause hearing, the trial court “was permitted by statute [RCW 42.56.550(1), (3)] to resolve, without oral argument, the basic issues before it[.]”¹⁰ It held the PRA allowed the trial court to manage such a case under the show cause provisions without reference to the civil rules of discovery, and that O’Neill’s constitutional due process claims were also unavailing because they “fail to cite to any authority that supports a constitutional right to a hearing with oral argument under the circumstances of this case.”¹¹

Division I misconstrued O’Neill’s argument and misunderstood the procedural aspects involved in a show cause hearing. It is standard practice in a PRA action to first file a motion to set a show cause

⁹ An academic research library is estimated to contain two terabytes of information. The entire Library of Congress comprises an estimated ten terabytes. One terabyte can be purchased for well under \$200. *See* Managing Your Inbox, “E-mail as a Public Record”, available at: http://www.records.ncdcr.gov/tutorial_email_20080801/index.html.

¹⁰ 145 Wn. App. at 937-38.

¹¹ *Id.* at 939.

hearing—a request for a hearing to be set at a later date.¹² The PRA does allow for the trial court to conduct a show cause hearing “based solely on affidavits,” making live testimony sometimes unnecessary and comparatively rare.¹³ The distinction here is that O’Neill filed a motion to set a show cause hearing, merely asking the court to set a hearing at which the agency was to appear. If the court decided such hearing would occur on affidavits, the parties could have been so advised and presented testimony via declaration. Division I apparently believed that because the PRA allows the trial court to consider only affidavits at a show cause hearing, the court could also deny a show cause hearing—and dismiss a lawsuit entirely—with no notice or hearing. *See* Opinion, 145 Wn. App. at 938-39. This is based on a failure to acknowledge the difference between filing the motion to set the show cause hearing and the hearing

¹² CP 309-310. *See also* Attorney General’s Open Government Internet Manual (“Internet Manual”), §1.7(D), *available at* <http://www.atg.wa.gov/OpenGovernment/InternetManual/Chapter1.aspx>.

The Internet Manual shows there is a distinction between the procedural motion to set a show cause hearing, and the show cause hearing itself. “A requester usually starts the case by filing and serving a complaint stating the facts. The requester also files a motion asking the court to order the agency to appear and show cause why it can lawfully withhold the record or part of a record, or why its time estimate is reasonable.... In the show cause order, *the court sets a date for the show cause hearing*. The parties can file a brief on legal issues and declarations on factual issues. The judge reviews the unredacted disputed records if lodged in camera and the briefs and affidavits before the show cause hearing.” (emphasis added) (citing WAC 44-14-08004(6)).

¹³ *See Cowles v. Publ’g Co. v. City of Spokane*, 69 Wn. App. 678, 683, 849 P.2d 1271(1993), *review denied* 122 Wn.2d 1013 (1993). However, oral argument and live testimony does occur in PRA cases. *See, e.g., Brown v. Seattle Public Schools*, 71 Wn. App. 613, 615, 860 P.2d 1059 (1993); *Prison Legal News, Inc. v. Department of Corrections* (“PLN”), 154 Wn.2d 628, 646, 115 P.3d 316 (2005); *Evergreen Freedom Foundation v. Locke*, 127 Wn. App. 243, 245 n.2, 110 P.3d 858 (2005).

itself.

The trial court's dismissal of O'Neill's case was a clear violation of O'Neill's due process rights, and Division I's failure to acknowledge this was error. In King County, unlike most other counties, a party must file a motion to set a show cause hearing at least six days before the date the party wants the motion to set the hearing considered.¹⁴ O'Neill complied with the local rules in bringing her motion for a hearing, but the trial court dismissed without holding a show cause hearing. In the January 9, 2007, Order Denying Plaintiffs' Motion for Reconsideration, the trial court stated: "A 'show cause' hearing was not necessary to adjudicate this case." CP 352. Thus, the trial court not only improperly denied O'Neill's procedural motion to set a future hearing, but also dismissed without allowing the hearing to which she was entitled. On appeal, Division I erroneously concluded that a show cause hearing had occurred.¹⁵ The trial court acknowledged no such hearing was held on affidavits or otherwise. The trial court's dismissal came not only at an inappropriate stage in the proceedings, but was also *sua sponte*, as Shoreline has conceded.¹⁶

¹⁴ See King County Local Rule (KCLR) 7(b)(4)(A).

¹⁵ See Opinion, 145 Wn. App. at 939 ("[T]here was nothing to prohibit the court from dismissing the case at the show cause hearing [.]; see also *id.* at 919 ("[The O'Neills] contend that the trial court abused its discretion by dismissing the case after the show cause hearing [.]").

¹⁶ See CP 329-330 (stating "*Sua sponte* dismissal was appropriate"). Shoreline never requested dismissal in their respective briefing nor did they file a motion to dismiss or a motion for summary judgment.

Moreover, the trial court improperly converted the decision of whether or not to set a show cause hearing into a *sua sponte* summary judgment by relying on materials outside the pleadings.¹⁷

The consideration of any materials outside the pleadings converts a motion to dismiss into a motion for summary judgment.¹⁸ A motion for summary judgment requires more notice than that provided to O'Neill.

The "reasonable opportunity" to present all material need not necessarily be the same 28 days required under CR 56, but clearly must be, at a minimum, more than the zero days afforded to O'Neill.¹⁹ Further, the

¹⁷ See CP 141 (Order Denying Plaintiff's Motion for Order to Show Cause, stating: "Further, the court finds that Plaintiffs' contention that any undisclosed documents are remaining is based upon unfounded speculation and Plaintiffs cannot overcome the City's *show of proof* that it has fully and completely responded in a lawful and appropriate manner.") (emphasis added).

¹⁸ "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and *all parties shall be given reasonable opportunity to present all material* made pertinent to such a motion by rule 56." CR 12(b) (emphasis added); see also *Hansen v. Friend*, 59 Wn. App. 236, 239, 797 P.2d 521 (1990) ("[A] motion originally brought under CR 12(b)(6) will be treated as a summary judgment motion where supporting affidavits or other evidentiary material is submitted to and not excluded by the trial court.") (citation omitted); see also *Limstrom v. Ladenburg*, 98 Wn. App. 612, 614, 989 P.2d 1257 (1999) (PRA case where appellate court reviewed *de novo* under summary judgment standard because trial court converted a CR 12(b)(6) motion into a motion for summary judgment by considering matters outside the pleadings). Because Shoreline never filed an answer to the Complaint, and the declarations were attached to its responsive briefing and not pleadings, those declarations were without question matters outside the pleadings.

¹⁹ See *Foisy v. Conroy*, 101 Wn. App. 36, 40, 4 P.3d 140 (2000) (ruling that the 28-day time frame mandated under CR 56 does not apply to converted motions to dismiss, but noting that the trial court offered more time for the party to respond to the motion to dismiss); see also *U.S. v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003) ("[I]f a district court considers evidence outside the pleadings, it must normally convert the 12(b)(6) motion into a Rule 56 motion for summary judgment, and it must give the nonmoving party an opportunity to respond.") (citations omitted).

applicable local rules mandate that oral argument be afforded to a party on summary judgment.²⁰ At a minimum, O'Neill should have been notified of the Court's intent to dismiss and be given time to adequately respond.

If the trial court wished to dispose of O'Neill's case, it was required to give O'Neill notice of such intent by at least issuing a motion and scheduling a hearing, thus giving her "reasonable opportunity" to argue her case—none of which happened here.²¹ O'Neill was given less than 24 hours to reply to Shoreline's responsive pleading on the hearing-setting motion, including four attached declarations—with no notice that the trial court could dismiss her lawsuit or was contemplating such action.²² The trial court and Division I misconstrued the procedural mechanisms of show cause proceedings in the PRA context, and erred on these issues.²³

²⁰ See KCLR 56(c)(1).

²¹ O'Neill maintains that had the trial court actually applied the substantive requirements under summary judgment, *i.e.* construing all facts in favor of her, the trial court abused its discretion in finding that Defendants were entitled to judgment as a matter of law.

²² See CP 165-66 at ¶¶6-9; see also *Jacobsen v. Filler*, 790 F.2d 1362, 1365-66 (9th Cir. 1986) (recognizing that courts must give notice to non-moving party that motion to dismiss has been converted to a summary judgment); see also *In re G. & A. Books, Inc.*, 770 F.2d 288, 295 (2d Cir. 1985) ("The essential inquiry is whether the appellant should reasonably have recognized the possibility that the motion might be converted into one for summary judgment or was taken by surprise and deprived of a reasonable opportunity to meet facts outside the pleadings."). Failure to give adequate notice upon a motion to dismiss converted into a summary judgment motion is reversible error. See *Finn v. Gunter*, 722 F.2d 711, 713 (C.A. Fla. 1984) (reversing trial court for failing to give mandatory notice requirement for a converted motion for partial summary judgment).

²³ See also Respondents' Answer to Petition for Direct Review, at pages 14-19, and Brief of Appellant, at pages 41-44. The City has conceded that the civil rules of procedure apply to PRA cases. See CP 330 (City's Response to Motion for Reconsideration).

C. O'Neill's September 18 Oral PRA Request Encompassed an Electronic Version of the Email, and the Metadata of that Email is a Public Record

Shoreline argues that a request for an email is not a request for the record in electronic form or the metadata embedded in the email.²⁴

Division I correctly concluded that the electronic version of the requested email was a public record (*see* Opinion, 145 Wn. App. at 924), but erroneously held that because O'Neill's September 18, 2006, oral request made no explicit mention of seeking an electronic version of the email or the metadata, a request for metadata was not made until her third written request on September 25, 2006. *Id.* at 932-33.

1. A request for an email encompasses full header information in its native electronic format and with its metadata intact

Emails are by definition electronic in nature. Shoreline's argument that O'Neill's request was not for the electronic version of the email or the metadata runs contrary to the fact that disclosure provisions in the PRA are uniformly construed broadly.²⁵ Shoreline did not need to be a "mind reader" to understand that a person stating "I want to see that email"

²⁴ See Shoreline Resp. Br. at 22; *see also* Reply to Resp. Answ. To Pet. For Review at 7-8; Shoreline Resp. Br. at 1, 6, 16-17, 19-20, 21, 22.

²⁵ Shoreline's attempts to construe O'Neill's request as narrowly as possible is against the clear language and interpretive case law of the PRA. Under the PRA "public record" is construed broadly. *See Ames v. City of Fircrest*, 71 Wn. App. 284, 291, 857 P.2d 1083 (1993) (citation omitted); *see also Yakima Newspapers, Inc. v. City of Yakima*, 77 Wn. App. 319, 323, 890 P.2d 544 (1995). The disclosure provisions are also construed broadly, and all exemptions from disclosure are explicitly construed narrowly. *See Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 527, 199 P.3d 393 (2009) ("RHA") ("[The PRA requires] broad disclosure of public records [.]").

meant that person wanted to see the email in its native form with all its parts. There can be no dispute that the paper printout of an email does not provide the equivalent information as does the email in its native form. Case law has held likewise on multiple occasions in similar contexts. *See* Resp. to Joint Mot. For Reconsid. at 11-12 (discussing *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1285 (D.C. Cir 1993)). O'Neill repeatedly made progressively more specific PRA requests related to the same email as her efforts to receive the record were frustrated—these later requests were objections demonstrating that the paper printouts that were being provided did not satisfy her original request.

An ordinary citizen should not be expected to know highly technical terms such as metadata—a term with which Division I admitted in oral argument it was unfamiliar—nor should they be required to specifically ask for that metadata. A request for an email seeks the full transmission chain of the email in its native format—which inherently includes its metadata.²⁶ Additionally, the basic information normally attendant to an

²⁶ A PRA request, like all disclosure provisions, is construed broadly as well. *See* WSBA, *Public Records Act Deskbook* (“Deskbook”) at 4-3 (“An agency has a duty to liberally construe the scope of a records request.”) (citing *Knight v. Food & Drug Admin.*, 938 F. Supp. 710, 716 (D. Kan. 1996)). Although *Knight* is a Freedom of Information Act (“FOIA”) case, this Court has repeatedly recognized that FOIA case law is persuasive in PRA cases. *See Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978) (“The state act closely parallels [FOIA] and thus judicial interpretations of that act are particularly helpful in construing our own.”). The Deskbook continues, stating that the “fullest assistance” provision of the PRA (RCW 42.56.100) was intended to prevent an agency from playing “hide the ball” in exactly the manner Shoreline here has. *See*

email, such as “to” and “from” and “bcc,” is not considered “metadata.”²⁷

The full header information of the original email from Thwing to Fimia with the “bcc” field, has still not been provided to O’Neill in its native electronic format. *See* Pet. at 4.

Division I correctly concluded that Shoreline had not complied with the PRA by producing printed-out records of different emails. *See* Opinion, 145 Wn. App. at 934-35. On September 20, 2006, the City provided a printed paper copy of the email that Fimia emailed to herself after removing the headers identifying Thwing as the sender. On September 25, 2006, the City provided a paper copy of the original email with the Thwing forwarding information (but lacking the full metadata, including the bcc field showing how the email was received by Fimia). On October 3, 2006, O’Neill was provided another paper copy of the email Thwing re-sent to Fimia on September 30, 2006, and the printed metadata from a September 18 email Thwing had blind copied to Janet Way. *Id.* at 930-31. Shoreline has still not given O’Neill the record she

Deskbook at 4-4 (citing *Violante v. King County Fire District No. 20*, 114 Wn. App. 565, 571 n.14, 59 P.3d 109 (2002) (court ruling agency should have provided record despite request being inexact as to the sought record)). FOIA cases have admonished agencies in similar contexts. *See Horsehead Indus., Inc. v. U.S. Envtl Prot. Agency*, 999 F.Supp. 59, 66 (D.D.C. 1998) (“[An agency] must be careful not to read the request so strictly that the requestor is denied information the agency well knows exists in its files, albeit in a different form than that anticipated by the requester.”).

²⁷ The City considers metadata to be “the embedded data within a document or email that may not visible in normal circumstances, such as creation date, hidden text and author information.” City Resp. Br. at 19.

sought: the email Fimia received on September 18, 2006, in its native electronic form, with its metadata intact, and without alterations. Shoreline did not provide a sufficient response. *See RHA*, 165 Wn.2d at 535 (reiterating that PRA demands “strict compliance” from agencies despite administrative inconvenience) (citing *Zink v. City of Mesa*, 140 Wn. App. 328, 339-40, 166 P.3d 738 (2007)).

2. Metadata of a public record is also a public record

Division I concluded that at least a portion of the metadata of the September 18 Thwing email to Fimia is a public record because it is a “writing”, that “relates to the conduct of government”, and that the email was “owned” by the City because it was discussed in an open public meeting. 145 Wn. App. at 924-25. O’Neill agrees with the portion of the Opinion concluding that metadata can be a public record, but disagrees with the Court of Appeals’ willingness to parse aspects of admitted public records into public/non-public sections.

An email is a writing within the context of the PRA. *See* WAC 44-14-03001(1) (stating that “writing” under the PRA is “defined very broadly” and that an email is a “writing” for PRA purposes).²⁸ An email

²⁸ *See Deer v. Department of Social and Health Services*, 122 Wn. App. 84, 89, 93 P.3d 195 (2004) (in deciding whether a record is a public record, “we construe the [PRA] liberally to achieve its purpose of preserving ‘the sovereignty of the people and the accountability of the governmental agencies that serve them’”) (citing *Limstrom v. Ladenburg*, 136 Wn.2d 595, 607, 963 P.2d 869 (1998)); *see also* WAC 44-14-03001(2)

encompasses the header information normally attendant to an email.²⁹ Similar to the “to” and “from” of an email, metadata³⁰ is integral in showing the transmission history of an email, and cannot logically be extricated from that email any more than the body can be. The metadata of an email is not a free-standing record subject to a public versus non-public analysis—it exists as an aspect of what Division I concluded was a public record—the electronic version of the original email from Thwing to Fimia. *See* Opinion, 145 Wn. App. at 924. To conclude that particular aspects of a public record need to be separately assessed under the three-part “public record” definition in the PRA leads to absurd results and is without basis in law. Under the PRA, aspects of a public record may be redacted because there is an overriding interest at play, manifested in the hundreds of exemptions and prohibitions from disclosure in the PRA—but

(stating that “[a]lmost all records held by an agency relate to the conduct of government” and that only “purely personal” records held by an agency are excluded from the public records definition under the PRA).

²⁹ *See* Office of Secretary of State – Division of Archives and Records Management, *Records Management Guidelines* at 27 (2001) (“For purposes of satisfying public record laws, e-mail is defined as not only the messages sent and received by e-mail systems, but all transmission and receipt data as well.”). This means that the “to”, “from”, “cc”, “bcc”, and subject line of an email is part of the email as much as the message it accompanies.

³⁰ Metadata has been defined by some courts as “information describing the history tracking, or management of an electronic document.” *Williams v. Sprint/Management Company*, 230 F.R.D. 640, 646 (D. Kan. 2005) (citations omitted). Citing the Sedona Guidelines, *Williams* stated that metadata is “information about a particular data set which describes how, when and by whom it was collected, created, accessed, or modified and how it is formatted.” *Id.* This includes “a file’s name, a file’s location, file format or file type, file size, file dates, and file permissions.” *Id.* (citations omitted). This definition has been cited by numerous cases dealing with metadata issues, usually in the context of discovery. *See Wyeth v. Impax Laboratories, Inc.*, 248 F.R.D. 169, 171 (D. Del. 2006); *see also Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 547-48 (2007).

this does not change the nature of the public record itself. Defendants are attempting to confuse the two to justify the alteration and destruction of the public record requested by O'Neill.

Shoreline cites *Lake v. City of Phoenix*, -- Ariz. Ct. App. --, 207 P.3d 725 (2009), in an amicus response for the proposition that metadata is not a public record that needs to be retained. In *Lake*, the requester was a demoted police officer who was seeking notes kept by supervisory lieutenants related to his performance evaluations—Lake suspected one lieutenant's notes in particular were back-dated to later justify his retaliatory demotion. *Lake*, 207 P.3d at 728-29. Lake sought the metadata related to the lieutenants' notes. *Id.* The City denied the request, in part, concluding the metadata was not a public record. *Id.* The *Lake* court held that the metadata of the electronic notes was not a public record the City was required to disclose. Central to the court's analysis in *Lake*, however, was the definition of "public record" under Arizona law, which differs dramatically from that of Washington. Arizona does not have a statutory definition of "public record." Instead, there are three alternative definitions of "public record," each more narrow than that of Washington's definition.³¹ *Id.* at 730-31.

³¹ According to *Lake*, in Arizona, to be a "public record," the record must be: (1) a record "made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions

Applying Arizona’s definitions, the *Lake* court concluded the metadata was not a public record because it was not created by the lieutenant pursuant to a duty, but was merely a by-product of the creation of the record by the computer. *Id.* at 731. The *Lake* court found the metadata did not meet the second test for a public record because the lieutenant was not required by law to create or maintain the metadata—only his notes from which the metadata emanated were required to be maintained. *Id.* Lastly, the court found that the third test did not apply because the metadata was not the transaction recorded by the lieutenant—his notes were. *Id.* (“The nature and purpose of the metadata relating to [the lieutenant’s] notes were to facilitate the preparation of the notes.”).

The *Lake* case does not aid Defendants’ arguments—in fact, it only cuts against them. The court in *Lake* acknowledged that Division I’s Opinion in this case is the only published authority dealing with whether metadata is a public record. *Id.* at 734 n.13. However, the *Lake* court emphasized that Washington’s definition of “public record” includes the language “*regardless of physical form or characteristics*” and was the

for public reference;” (2) a record “required to be kept, or necessary to be kept in the discharge of a duty imposed by law or directed by law to serve as a memorial and evidence of something written said or done”; or (3) a “written record of transactions of a public officer in his office, which is a convenient and appropriate method of discharging his duties, and is kept by him as such, whether required by ... law or not.” *Id.* at *3 (citations omitted). Also, a court in Arizona is to “look to the nature and purpose” of the document to determine its status as a public record [.]” (citations omitted). *Id.*

reason why “*O’Neill* is not helpful to our analysis here.” *Id.* The fact that the *Lake* court cited *O’Neill* in this manner suggests that had Washington’s definition of public record applied, the result would have been different.

Judge Patricia Norris’s dissent in *Lake* is instructive. Judge Norris began her opinion by reframing the issue to be whether “the electronic version of [the lieutenant’s] notes, which includes the metadata, is a public record.” *Id.* at 738-39. Because the electronic notes were unquestionably a public record, the metadata that is “integral to the original electronic documents created by [the lieutenant],” must be as well—by using a computer to write his notes, the lieutenant created the metadata in the same manner he created the text of his notes. *Id.* at 739. In other words, to claim that the “computer” wrote the metadata is absurd—metadata is created contemporaneously with the text, and exists only because a person created the text. Judge Norris elaborated by stating:

The majority’s approach suggests metadata is somehow different from the underlying public record, and therefore, metadata has a different “nature and purpose from the public record.” This approach fails to recognize metadata is part of the requested electronic document. Suggesting metadata, standing alone, falls outside the various formulations of a public record recognized in Arizona, misses the point—metadata does not stand alone. It is not an electronic orphan. It has a home; it exists as part of an electronic document. When, as here, that electronically created document is a public record, then so too is its metadata.

Id. at 740.

Judge Norris also described that printing a paper copy of an electronic record inevitably excludes at least some of the metadata, and in the context of that case, necessarily “kept from public inspection the full content of [the lieutenant’s] notes which are undisputedly public records.” *Id.* at 739. The kind of information contained in the metadata, including creation date, access date, print dates, alterations, etc., at least applied to a Word document or a spreadsheet, “can be crucial to ensuring government transparency,” according to Judge Norris. *Id.* at 740-41 (citing *Armstrong v. Executive Office of the President*, 810 F.Supp. 335, 341 n.12 (D.D.C. 1993)). Judge Norris concluded by noting that the electronic version of the notes at issue in that case, including the metadata, “is precisely the type of information our public records law is meant to reveal.” *Id.* at 741.

Judge Norris’ dissent presents a reasoned argument against parsing sections of public records, as Division I and Shoreline have done in the immediate case. A record is either a public record or not, each word or sentence in the record is not subject to analysis on this threshold question—the metadata of an email, just like the metadata of a Word document, is inextricably intertwined with the rest of the document. The fact that the information may be not visible in the document, or contains information that is not readily understandable to a lay person is

irrelevant—Washington’s law makes clear that a record may be public “regardless of physical form or characteristics” and that electronic records are not treated any different than paper records.³² Any reliance on the majority opinion in *Lake* by Shoreline is thus in error and does anything but help its case.

D. The Court Must Clarify that Agencies are Not Entitled to Costs or Fees under RCW 42.56.550(4).

The trial court awarded costs to Shoreline.³³ Shoreline later agreed that part of the Order could be stricken.³⁴ Division I did not address the issue as the City had rescinded its right to the award.³⁵ O’Neill addresses the issue here as it is probable the claim will be raised by another agency and yet will evade review as agencies can always drop the claim if it is appealed. This Court should clarify that such awards are contrary to the express provisions of the PRA and all of its case law.³⁶ Allowing a

³² See RCW 42.56.010(2); see also *PLN*, 154 Wn.2d at 635 (“Any written information about government conduct is a public record, regardless of its physical form or characteristics.”) (citation omitted).

³³ See CP 141.

³⁴ See CP 331; see also City Resp. Br. at 27.

³⁵ Opinion, 145 Wn. App. at 939.

³⁶ See RCW 42.56.550(4); WAC 44-14-08004(7). Washington courts recognize that “[s]trict enforcement of this provision discourages improper denial of access to public records.” *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 101, 117 P.3d 1117 (2005) (citation omitted). Moreover, “permitting a liberal recovery of costs” for a requestor in a PRA enforcement action, “is consistent with the policy behind the act by making it financially feasible for private citizens to enforce the public’s right to access public records.” *Am. Civil Liberties Union of Washington (“ACLU”) v. Blaine Sch. Dist. No. 503*, 95 Wn. App. 106, 115, 975 P.2d 536 (1999); see also WAC 44-14-08004(7) (“The purpose of [the PRA’s] attorneys’ fees, costs and daily penalties provisions is to reimburse the requester for vindicating the public’s right to obtain public

prevailing agency to recover costs against a requester undermines the strong policy of the PRA and discourages citizens from asserting their rights. Any attempt by a prevailing agency to impose costs against a requester will have a chilling effect on other private citizens' willingness to enforce the public's right to government transparency. *See* CP 151 at ¶10, 156 at ¶15, 162-163 at ¶¶21-23. This Court must address the issue to dissuade any trial court in the future from ruling as the trial court did here. Division I's dismissal of this issue should not have been contingent on a voluntary waiver by an agency, but should have been based on a statement of the law.

E. O'Neill is Entitled to Attorneys' Fees, Costs and Mandatory Penalties on Appeal Because O'Neill Was the Prevailing Party

Division I concluded that the trial court erred in ruling that no further records held by Shoreline were subject to disclosure and that remand was necessary to see if those records existed. *See* Opinion, 145 Wn. App. at 936. Specifically, Division I ruled that remand was necessary (1) to determine if the computer hard drive of Fimia contains the metadata associated with the original email from September 18, 2006; (2) to determine whether the email forwarded to the City Attorney on September 25, 2006 contains the same metadata as the original email; (3) to

records, to make it financially feasible for requestors to do so, and to deter agencies from improperly withholding records." (citing *ACLU*).

determine whether the email that Thwing re-sent to Fimia contains the same metadata as the original email; and (4) to determine that if the metadata of the original email cannot be found, whether that is a violation of PRA. *Id.* Division I concluded that O'Neill was entitled to attorneys' fees on appeal because she partially prevailed, and that the trial court was to determine the amount of those fees and penalties. *Id.* at 936, 940.

Shoreline argues that Division I erred in declaring O'Neill the prevailing party alleging the trial court did not find a violation of the PRA. Pet. at 16. Previous case law is clear that a person that loses at trial in a PRA action but prevails on the principal issue on appeal is entitled to attorneys' fees, costs, and mandatory penalties.³⁷ This Court in *Limstrom*, 136 Wn.2d at 616, remanded back to the trial court to determine whether a violation of the PRA occurred, but awarded attorney fees—"[including] fees on appeal"—to the requester. Here Division I determined that O'Neill was entitled to her *fees on appeal* because she substantially prevailed on appeal. Division I reversed the trial court and determined Shoreline had not adequately shown Fimia's computer did not contain the

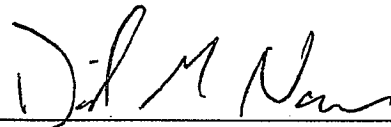
³⁷ See *O'Connor v. Washington State Dept. of Social and Health Serv.s*, 143 Wn.2d 895, 911, 25 P.3d 426 (2001); see also *Olsen v. King County*, 106 Wn. App. 616, 625, 24 P.3d 467 (2001) (remanding on appeal to calculate fees and costs for requester that had lost at trial, finding agency had still not provided responsive records even though requesters already had copies of requested documents); see also *Zink*, 144 Wn. App. at 348-49 (finding requester substantially prevailed on appeal, and remanding to determine fees and costs).

responsive records. An award of attorneys' fees, costs and penalties here is consistent with other PRA case law and must be awarded here.

IV. CONCLUSION

For the reasons set forth above, O'Neill respectfully requests that this Court uphold Division I's conclusions on the issues specified by Shoreline. However, O'Neill also respectfully requests that this Court reverse Division I's erroneous conclusions that (1) metadata is a separate and distinct public record from the public record it is embedded within; (2) a PRA request for an email does not necessarily imply a request for the email in its native form; (3) dismissal upon a motion to set a show cause hearing is permissible under the PRA and court rules and the State and federal Constitutions; (4) a show cause hearing was held by the trial court; and requests that this Court clarify that the PRA does not allow a court to award attorney fees or costs to a prevailing agency in a PRA action.

Respectfully submitted this 29th day of July, 2009

By: 
Michele Earl-Hubbard, WSBA #26454
David Norman, WSBA #40564
Chris Roslaniec, WSBA #40568
2200 Sixth Avenue, Suite 770
Seattle, WA 98121

ALLIED
LAW GROUP

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on July 29, 2009, I caused the delivery of a copy of the foregoing Supplemental Brief to the following by the method indicated:

By email pursuant to agreement and by U.S. Mail:

Flannary P. Collins
Attorney for Appellant City of Shoreline
City Attorney's Office
17544 Midvale Avenue North
Shoreline, WA 98133

By email pursuant to agreement and by U.S. Mail:

Ramsey Ramerman
Attorney for Appellant Maggie Fimia
Foster Pepper PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3299

By email:

Michael Brannan
Attorney at Law
555 Dayton Street, Suite H
Edmonds, WA 98020

By U.S. mail to

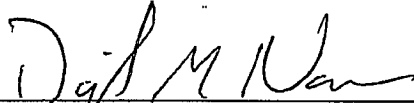
William John Crittenden
927 N. Northlake Way, Suite 301
Seattle, WA 98103

Gary T. Smith
Seattle City Attorney's Office
P.O. Box 94769
Seattle, WA 98124

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CLERK

Patrick Denis Brown
6112 24th Avenue N.E.
Seattle, WA 98115

Dated this 29th day of July, 2009 at Seattle, Washington.



David M. Norman